

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) No. 09-CR-089-RHW
5 vs.) October 7, 2009
6 TIMOTHY A. SHELLY,) Spokane, Washington
7 Defendant.) Transcript of:
Pretrial Conference/Motion
Hearing

8
9 BEFORE THE HONORABLE ROBERT H. WHALEY
10 SENIOR UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 For the Plaintiff: Stephanie J. Lister
13 Assistant United States Attorney
14 P.O. Box 1494
Spokane, WA 99210-1494

15 For the Defendant: Amy H. Rubin
16 Federal Defenders of Eastern
17 Washington and Idaho
10 North Post Street, Suite 700
Spokane, WA 99201

18
19
20
21 Official Court Reporter: Debra Kinney Clark, RPR, CSR
22 United States District Courthouse
23 P.O. Box 700
Spokane, WA 99210
24 (509) 458-3433

25 Proceedings reported by mechanical stenography; transcript
produced by computer-aided transcription.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WITNESS INDEX

ON BEHALF OF THE PLAINTIFF:

DR

CR

Norma Loza

6

8

1 (October 07, 2009; 10:00 a.m.)

2 THE COURTROOM DEPUTY: We have United States of
3 America v. Timothy Shelly, Case No. CR-09-089. Time set for
4 pretrial conference and motion hearing.

5 THE COURT: Let me say something before you start,
6 Ms. Lister. I want to summarize what I have.

7 I've got the tapes of the arguments, but it doesn't seem to
8 me that any evidence was admitted in front of the magistrate
9 except the pretrial services reports. So if there was something
10 else, I need to be aware of that. And then in the government's
11 memorandum, there are a number of factual allegations made about
12 the particular case, pages 3 through 6; and I don't know if the
13 magistrate had the underlying reports that established those
14 facts. It would seem to me that if those facts are being
15 considered that I should have some record of that. Maybe she
16 had it; maybe she didn't. But it seems to be -- I want to --
17 I've got an indictment. I've got the pretrial services report.
18 And then I don't think there was any other evidence. So I just
19 want to make sure that the record I have is complete.

20 Now you can speak.

21 MS. LISTER: Your Honor, I apologize first for filing
22 that memorandum so late. What happened was I didn't receive it
23 through the ECF immediately. But then when I looked at the
24 file -- usually, there's a complaint or a search warrant that
25 has the factual basis for the magistrate to use as a basis for

1 determination. That was not present in this case. And you're
2 correct. There was not testimony presented. I presented a
3 proffer factually, but there was no testimony from an agent.
4 Thus, I filed this memorandum with the facts and have
5 Special Agent Loza prepared to testify to those facts if the
6 Court is not satisfied with the proffer.

7 THE COURT: Well, I'm satisfied with the proffer if
8 the defense doesn't contest it. But I -- I'm supposed to do
9 this de novo, and then I'm -- and the Circuit has got to have
10 some record if it goes up. And I'm just trying to establish the
11 factual record, which -- so it's not whether I'm satisfied.
12 It's whether the defense is satisfied with the proffer. And if
13 they aren't, then I would hear from the FBI agent because the
14 heart of your argument is the facts; and it seems to me that
15 that's something that needs to be in the record. So I don't
16 know.

17 MS. LISTER: And the other --

18 THE COURT: Do you object to the facts as they're set
19 out in the government's brief?

20 MS. RUBIN: I guess the concern I have, Your Honor, is
21 that I may have some questions for the agent. And it's not that
22 I object to the facts, but I'm just concerned that we haven't
23 had a chance to cross-examine her. And there may be some
24 questions that we have that may go to some of the factors that
25 the Court needs to consider with regard to Mr. Shelly's release

1 or not.

2 THE COURT: Put her on the stand and let her tell us
3 about it, and you can cross-examine.

4 MS. LISTER: Agent Loza?

5 MS. RUBIN: And, Judge, just for the record, I just
6 want to make sure that you were also aware that there were two
7 declarations filed.

8 THE COURT: I've read them.

9 MS. RUBIN: Okay.

10 THE COURT: I've read everything you filed, and I've
11 read the government's memo that I got this morning. And I've
12 listened to the tapes. I didn't listen to all of the tape. I
13 listened to your arguments, and then I listened to some of
14 Ms. Lister's. And then -- and I -- but the reason I didn't have
15 to finish it was because it was clear there was no evidence. So
16 I was going to hear the arguments anyway. So as soon as I knew
17 that I wasn't going to hear any testimony, then I concluded I
18 would listen to your arguments today.

19 Okay. Come on up.

20 THE COURTROOM DEPUTY: Ma'am, would you please raise
21 your right hand?

22 (WITNESS, NORMA LOZA, called as a witness on behalf of the
23 plaintiff, having first been duly sworn, testified as follows:)

24 THE COURTROOM DEPUTY: Okay. Would you please have a
25 seat?

1 Would you please state your name; and spell your first and
2 your last name for the record, please.

3 THE WITNESS: Norma Loza. N-o-r-m-a. Last name,
4 L-o-z-a.

5 MS. LISTER: And, Judge, I'm going to shorten this up.

6 THE COURT: Please.

7 DIRECT EXAMINATION

8 BY MS. LISTER:

9 Q Agent Loza, have you had an opportunity to review the
10 memorandum provided to the Court in opposition to the
11 defendant's appeal; specifically, the facts on pages 3, 4, 5,
12 and 6 of that memorandum?

13 A Yes, I have.

14 Q And do you have an opinion as to whether or not there are
15 any incorrect statements or statements that you believe need to
16 be clarified for the Court?

17 A The only statement that should be clarified is in April of
18 2007, I wasn't assigned the case. I was just assisting on the
19 matter. I actually started in Spokane in April of 2007. I was
20 in the Los Angeles division prior to that.

21 Q So on page 5 of the memorandum, at lines 4 and 5, I wrote:
22 "Unfortunately, due to a number of events, staffing and resource
23 issues, FBI Special Agent Loza was not assigned to this case
24 until April of 2007." And you're saying that's incorrect? You
25 came to Spokane in April of 2007?

1 A Right. I started working on the matter, but I wasn't
2 assigned the case.

3 Q Okay. And that -- I have one other question, Agent Loza.
4 In this memorandum, it doesn't indicate whether or not there was
5 any contact with the -- between the defendant and the victim
6 after the Labor Day weekend in 2005. Could you provide any more
7 details with respect to that for the Court?

8 A Yes. When I interviewed the victim on January 10th of
9 2008, she had informed me that after Detective Sharp of the
10 Ferry County Police Department -- or -- Sheriff's Department --
11 spoke with her that he asked her if she could contact the
12 defendant in this matter and try to get him to come back out to
13 Washington so they could arrest him. So she actually -- they
14 did have contact. And she actually tried to get him back out.
15 But then she felt bad. And about a month after that, she
16 informed him that law enforcement had requested that he come
17 back out so they could arrest him.

18 Q Now, when you say, "she informed him," who are you
19 referring to?

20 A The defendant.

21 Q Okay.

22 A The defendant.

23 Q So the victim told the Defendant Shelly that law
24 enforcement had initiated that call or had asked her to call?

25 A Right.

1 Q Okay.

2 A Right. For her to contact him. So then they -- they still
3 kept contact from the date of the occurrence all the way up
4 until I think April of 2007. She actually moved. And we didn't
5 know this, but she actually had moved from Washington to Indiana
6 in January of 2007. And during that time, they were still in
7 contact -- telephone, e-mails. And I believe in April of 2007,
8 he had stated that he wanted to go to Indiana and meet with her;
9 but that meeting never occurred. And then also, she found a new
10 boyfriend at that time and requested that he no longer contact
11 her; but he still tried to contact her. And she had to have her
12 boyfriend actually call him and say to leave her alone. So they
13 had contact until mid -- at least mid 2007.

14 Q So in mid of 2007, how old would the victim have been?

15 A Probably about 15.

16 MS. LISTER: No further questions, Your Honor.

17 THE COURT: All right.

18 CROSS-EXAMINATION

19 BY MS. RUBIN:

20 Q Agent Loza, just so I have a time frame here, in September
21 of 2005, was that when this investigation started with maybe
22 local law enforcement in Michigan and also in Ferry County?

23 A Yes.

24 Q Okay. And that was, you said, September of '05,
25 approximately?

1 A Yes.

2 Q Okay. And then you became involved with the case in 2007?

3 A That's correct.

4 Q Okay. But the case had been -- there had been an ongoing
5 investigation?

6 A Well, I think they referred it to us at the end of 2005.
7 And the individual who it was referred to took the hard drive,
8 started the initial process of the case, and then he was
9 assigned other matters -- high-profile cases, part-time
10 supervisor. There just wasn't enough man resources. And he was
11 a cyber specialist. And so --

12 Q So local law enforcement referred the case, at the end of
13 2005, to FBI?

14 A Yes.

15 Q Okay. And between -- you're obviously familiar with this
16 case. Is that fair to say?

17 A Yes.

18 Q Okay. Between local law enforcement receiving this
19 information about this case until Mr. Shelly's arrest --

20 A Uh-huh?

21 Q -- he has not had any contact with law enforcement in terms
22 of arrest, has he?

23 A No. Not to my knowledge.

24 Q Okay. And the contact in January of 2008 was at the
25 request of law enforcement for the victim to contact Mr. Shelly?

1 A There was no request in 2008 for him to --

2 Q Well, I guess --

3 A -- for her to contact. That was in 2005. That was in
4 September of 2005. Right after -- yeah.

5 Q I guess I'm confused, then.

6 A Sure. No problem.

7 Q I thought you said -- I thought you said approximately
8 January 10th of 2008, law enforcement asked if the victim could
9 contact Mr. Shelly.

10 A If I said that, that was incorrect.

11 Q Okay. Maybe I misunderstood.

12 A Sure. They asked that in September of 2005, right after
13 the incident occurred --

14 Q Oh. Okay.

15 A -- to get him to come back.

16 Q Okay. He didn't come back?

17 A No, he did not.

18 Q Okay. And --

19 A She felt bad and then told him about what law enforcement
20 had stated.

21 Q But he didn't come to Washington?

22 A That's correct.

23 Q Okay. And he didn't go to Indiana?

24 A That's correct.

25 Q Okay. And he has not been arrested between 2005 and his

1 arrest for this charge?

2 A That's true.

3 Q Okay. And law enforcement, obviously, in the last five
4 years, has been aware of these charges?

5 A Since --

6 Q Of these pending charges?

7 A Since -- yeah. The charges were -- yeah.

8 Q Okay. And Mr. Shelly -- has he resided in Michigan this
9 whole time?

10 A I -- to the best of my knowledge.

11 Q Well, at the time of the -- at the time the incident
12 occurred, was he a resident of Michigan?

13 A Yes.

14 Q And was he arrested in Michigan?

15 A Yes.

16 Q And between 2005 and his arrest, do you have any
17 information to suggest he had lived outside of Michigan?

18 A No.

19 MS. RUBIN: Okay. Your Honor, I don't believe I have
20 any further questions.

21 THE COURT: All right. Thank you.

22 THE WITNESS: Uh-huh.

23 MS. LISTER: Nothing further. Thank you, Your Honor.

24 THE COURT: All right. Then I'm going to consider as
25 additional factual record the facts beginning on line 14 of

1 line 3 (sic) of the government's brief, entitled United States'
2 Memorandum in Opposition to Defendant's Appeal of Magistrate's
3 Order of Detention, through line 23 on page 6 of the same brief.
4 All right.

5 MS. RUBIN: Your Honor, I don't know if the Court
6 wants me to just start at the beginning; but I'm happy to. And
7 just so the Court knows, I have Angela Shelly and Tammy Shelly
8 available by phone if --

9 THE COURT: Let me tell you -- let me tell you -- I've
10 read it all, and I've listened to your arguments -- all of them.
11 I just haven't heard all of Ms. Lister's. But the concerns that
12 I had -- I find I probably release more people than others, but
13 that's the way I read the law. The record I have right now is
14 the offense conduct did not end as it looked like in 2005, but
15 there were additional communications that were part of the same
16 conduct of contacting the victim. The proffer indicates a
17 very -- what I would call a serious case, with significant
18 allegations of wrongdoing that look like they have -- you
19 know -- sentences of substantial time. I think it says
20 15 years. And it's not just a case like I have a lot of them,
21 which are someone that's obtaining and receiving child
22 pornography, but it's one that looks like it's created child
23 pornography and then actually has a physical victim. So it
24 seems to me that, from the cases I've had, that the nature and
25 circumstances of the offense, to me, are a significant factor.

1 And then the weight of the evidence seems to be not as
2 significant, but it seems to be significant that there is a
3 significant weight.

4 The problem I then have is -- on the record I have -- is
5 your client lied to the probation department about drug use.

6 MS. RUBIN: I --

7 THE COURT: Now, let me finish. You want to contest
8 that, but you haven't. Now --

9 MS. RUBIN: I can't.

10 THE COURT: Well, I'm not sure that's true. I mean,
11 you may not be able to contest it in some ways. But, I mean, if
12 you really wanted to contest it, you could probably find some
13 information about how often that lab is right or wrong, for
14 instance. If you have tests that are done contemporaneous in
15 his employment, you could put that in. All you've done is
16 reference it in an argument, but I don't have any evidence of
17 that. So -- and I'm going to finish anyway before you interrupt
18 me.

19 And so I have a situation where I have a serious crime that
20 concerns me; I have a circumstance where you want to release him
21 where there are other children and this conduct appears to have
22 continued up into 2007; and what I perceive to be a lie about
23 drug use. And so those things don't give me any confidence in
24 your client, and that's what would cause me to not disturb the
25 magistrate's order. So -- and my conclusion was, after I'd

1 listened to you, if you want to challenge this drug thing, do
2 it. I mean, you may or may not be successful. But you proffer
3 that there's -- you know -- other drug tests. I don't know when
4 they were or how often they were or what they tested for, and I
5 don't know how often this lab is correct or not, and I don't
6 know anything about the person that did the test or the test
7 procedures. But all those things you can investigate if you
8 think it would convince me that that test is unreliable, and I
9 would listen to you. But there's no evidence of it, is my
10 point. That's why I asked: What's the evidence in this case as
11 opposed to argument?

12 MS. RUBIN: Well -- and let me just respond to the
13 Court's concern about the drug test. The problem that I have,
14 which is -- you know -- so -- it's so unusual in this case
15 because we don't have the same type of drug testing that we do
16 here. The probation officers do a preliminary test, which I
17 believe is just a stick; and it comes back either presumptive
18 positive or not. They then send that test out for further
19 testing.

20 The problem that I had in this case was that there's
21 actually a lab that I guess the probation officer or office uses
22 in the District of Eastern Michigan that is actually contained
23 within their own office. They don't keep samples. So there's
24 no -- there's no method for me to retest the sample that was
25 provided by Mr. Shelly because they don't keep samples for

1 further testing. I verified that with the Federal Defenders in
2 Michigan as well, and that is the case. I talked to the lab
3 technician, and that is the -- that's the information that she
4 provided to me.

5 I certainly would be happy to investigate the test that
6 Mr. Shelly provided with his employment; but, of course, these
7 tests may be over a year old. I mean -- so unfortunately, I
8 don't know that that's going to be -- you know -- something that
9 the Court can look at -- whether or not he has a drug use
10 problem or not. I mean, our position is that he doesn't and
11 that --

12 THE COURT: I'm not so concerned about having a drug
13 use problem as lying. So --

14 MS. RUBIN: But --

15 THE COURT: -- whether or not -- you know -- he
16 continues to be tested for it, the record I have right now is he
17 lied.

18 Now, you have a means to contest it. It might not be the
19 best because you can't contest a sample. But that doesn't mean
20 that the book is closed. It just means you have a harder time.
21 And I don't know what the evidence is. You may call back there,
22 and they say, hell, we send these things out all the time; and
23 we're wrong half the time. I don't know. I don't know. But
24 you are making an argument to me that's not in the record
25 factually. So I'm -- you know --

1 MS. RUBIN: I guess I'm just responding to the Court's
2 questions. I'm sorry if --

3 THE COURT: I know. But I'm trying to respond to you
4 that -- there's more than one way to challenge something, and
5 you know that. And it's not just -- and I don't have a factual
6 record to support what you're saying. So that's the problem I
7 have.

8 MS. RUBIN: Then obviously we will address that, Your
9 Honor. But I don't think it's -- I think that it's -- to say
10 that my client lied when we don't have an opportunity to contest
11 that --

12 THE COURT: You have an opportunity. It's just you
13 haven't taken it.

14 MS. RUBIN: Well, if there's no sample to challenge,
15 there's no way to retest that sample.

16 THE COURT: Well, I've explained that.

17 MS. RUBIN: And that's the whole --

18 THE COURT: I mean, if that's your position, I'm
19 finding it's not credible that there's not some way for you to
20 determine whether or not I should not believe the test report
21 other than your word that I shouldn't. So -- you know --

22 MS. RUBIN: Then we'll have maybe a declaration from
23 the technician that says that they're -- they throw their
24 samples away.

25 THE COURT: I -- I -- I accept that. You don't need a

1 declaration. I assume that that sample is not available.

2 MS. RUBIN: But even -- even if -- you know. Even
3 when we've been before the court or the magistrate when clients
4 may have an issue with substance abuse, the reality is is that
5 the court can fashion conditions that would address those
6 issues.

7 THE COURT: I'm not concerned about --

8 MS. RUBIN: Well -- and I understand the Court --

9 THE COURT: -- substance abuse. I'm concerned about
10 whether he lied. And that's --

11 MS. RUBIN: Then, Your Honor, I guess we'll have to be
12 back before the Court to address that issue because there's
13 nothing that I --

14 THE COURT: Well, it depends on what evidence you come
15 up with.

16 MS. RUBIN: But there's nothing that I have today.

17 THE COURT: I know. And that's why I started off with
18 this so that you wouldn't argue about a lot of things without
19 knowing what my concern is.

20 I'm not so concerned about him using marijuana. I think
21 that probably can be addressed. I am concerned that he lied.
22 And the whole basis of releasing somebody with this kind of
23 serious offense is for me to believe somehow that these
24 conditions are going to satisfy the danger to the community, and
25 I'm not satisfied with that if he lied to the probation

1 department.

2 MS. RUBIN: Then I guess we'll have to readdress this
3 issue because I don't know that it's -- it may be pointless for
4 me to go and present the rest of my argument if the Court is
5 going to determine that based on that statement to probation
6 that that -- the determination that the Court is going to
7 make -- that they're not going to release him based on that.

8 THE COURT: Well, I'll listen to whatever argument you
9 want; but I wanted you to have -- I listened to the argument you
10 made in front of the magistrate, and it had to do with this; and
11 there was no evidence to support that. And so I take the
12 probation report which -- at the beginning of that hearing, you
13 said you had no objections to it; but I don't hold you to that.
14 I mean, I think you can object to the drug test; but there's
15 just no evidence to do that right now.

16 MS. RUBIN: I guess I just -- I mean, I should have
17 objected. But I guess that I didn't realize that that was going
18 to be such a --

19 THE COURT: I'm not holding you to that. I'm assuming
20 you objected to it.

21 MS. RUBIN: Yeah. Well, we objected before the
22 magistrate; so I think our position remains the same.

23 THE COURT: I understand.

24 MS. RUBIN: I mean, I think it's pointless for us to
25 go forward with the rest of our argument, though, because

1 obviously the Court's -- one of the major concerns, though,
2 today is the fact that there may have been a misrepresentation,
3 albeit that we object to that. But the Court feels there was a
4 misrepresentation to the probation office. So I think that for
5 us to go further -- I think the Court has already made it clear
6 the Court is probably going to deny our appeal at this point
7 until we are able to provide enough information to the Court to
8 either suggest that it's not feasible for us to test the sample
9 that was provided and the results that this -- that this office
10 may or may not have -- you know -- on other tests, or that we
11 are able to obtain some information maybe from his employers to
12 show the Court that he has had negative tests in the past. I
13 mean, we've obviously got to be able to have time to do that;
14 and we're not prepared to do that today.

15 THE COURT: I understand that.

16 MS. RUBIN: So I think that for me to go and discuss
17 all the other issues I was going to discuss seems pointless at
18 this point --

19 THE COURT: All right.

20 MS. RUBIN: -- because I think the Court has already
21 made it clear which way the Court's going to rule.

22 THE COURT: All right.

23 MS. RUBIN: I mean, I don't know. I don't want to --
24 I don't want to put words in the Court's mouth. But I don't
25 want to -- I don't want to waste your time or my time presenting

1 an argument if --

2 THE COURT: I've told you what concerns me. And if
3 you want to address those things that concern me, or anything
4 else, you can. But I've explained, by and large, going through
5 the statutory items, which I've done with you before, and I
6 usually find some way to release somebody if I think it's
7 appropriate, what is leading me not to do that. And there's
8 nothing you've said except, well, I can't test it, that rebuts
9 that; and I'm not satisfied with that.

10 MS. RUBIN: Well, then, I think that we need more
11 time, Your Honor --

12 THE COURT: All right.

13 MS. RUBIN: -- because I think it's pointless to go
14 forward.

15 THE COURT: Okay. I've already said it, but the
16 nature and circumstances of the offense have been explained, and
17 the weight of the evidence.

18 The history and characteristics of the defendant -- he has
19 significant family ties, it appears, to Michigan. And I have no
20 reason, other than this particular offense, to conclude that he
21 has any problems with his character or a physical or a mental
22 condition, or criminal history. And I don't have any
23 information that he hasn't appeared at prior court proceedings.
24 But I do have -- what to me is significant is what I believe is
25 an indication that he lied about drug use. And I do believe I

1 could address drug use adequately, but I can't -- part of
2 releasing somebody is believing them and believing that they're
3 going to be truthful in what they say to the Court and
4 otherwise, and I don't have that perception. And I think that
5 the community is endangered by someone who has committed this
6 type of offense and that, even after being advised that law
7 enforcement was aware of what he had done, continued to try to
8 have contact with the victim by phone or e-mail. And I am
9 concerned -- I've focused on the drug test. And I am not
10 deciding because if I was convinced by the defense that I should
11 disregard that and then I just had the plan that has been set
12 forth, I would have a lot of concern in releasing him to a place
13 where there are two children. And if I was going to do that, I
14 would probably want to hear from the mother. I'd be glad to do
15 it by video conferencing.

16 So if you're going to contest the drug testing, I'm just
17 trying to tell you that even if I didn't have that, these
18 allegations that appear to go from 2005 into 2007 would cause me
19 concern about having him around young children. So I'd have to
20 satisfy myself in some way that I wasn't putting those children
21 in danger or any other children in danger. It looks like
22 there's a school within two-tenths of a mile, so I'd want to get
23 a better record on that.

24 MS. RUBIN: May I just inquire as to that issue that
25 the Court just raised --

1 THE COURT: Sure.

2 MS. RUBIN: -- just to save some resources?

3 With the Court being concerned about the issue of
4 Mr. Shelly being released to a residence with two children, if
5 we are able to provide probation with a different residence,
6 where there would be no children, would the Court go ahead and
7 permit probation to ask the Eastern District of Michigan to do a
8 home check on that residence? Because I'm afraid that what
9 we're going to get into is that if the Court wants another
10 residence, then we have to wait for the Court to ask probation,
11 then probation asks Michigan to do the home check. So if we
12 provide an address to probation, would the Court go ahead and
13 recommend to probation to allow the Eastern District of Michigan
14 to go ahead and do a home check? Because that --

15 THE COURT: Why don't you bring that information to
16 me --

17 MS. RUBIN: Okay.

18 THE COURT: -- and I'll -- I'd be glad to authorize
19 probation to do something.

20 MS. RUBIN: Because I know that that can take a period
21 of time as well.

22 THE COURT: That -- you know. If you get another
23 location, tell probation about it. And tell me about it --

24 MS. RUBIN: Okay.

25 THE COURT: -- so I know what's happening,

1 Mr. Kennicutt. And then it's all right with me if you
2 investigate it. But I've gone over what my concerns are. So I
3 would deny this, and it's immediately appealable. And I think
4 there's a sufficient record if you want to do that. All right.

5 Anything else?

6 MS. RUBIN: We have one other issue. Yes.

7 THE COURT: All right.

8 MS. RUBIN: Well, it's a pretrial conference. So --
9 Mr. Peven is actually the attorney of record on this case. But
10 after speaking with Mr. Peven, we would ask the Court for more
11 time. We've been very, very focused, of course, on the bail
12 hearing.

13 There is a pretty large amount of discovery. We've not had
14 an opportunity to review the computer and the hard drive. We
15 have discussed that with Ms. Lister. We're going to file a
16 joint stipulation to the Court which would allow Mr. Shelly's
17 team at the Federal Defenders to be able to review that
18 information. And so at this time, Your Honor, we would ask for
19 a continuance. We believe that it's necessary in order to
20 effectively represent him. It's in the interests of justice.
21 And probably -- I would -- I would think that somewhere between
22 90 and 120 days would be sufficient, Your Honor.

23 THE COURT: Ms. Lister?

24 MS. LISTER: I've already advised Ms. Rubin I have no
25 objection, Your Honor.

1 THE COURT: Has the victim been advised?

2 MS. LISTER: No. I just found out today --

3 THE COURT: I believe that under -- I think I have
4 to -- that has to be done.

5 MS. LISTER: That's correct, Your Honor. We'll reach
6 out to the victim today.

7 THE COURT: Would you file something?

8 MS. LISTER: Yes, Your Honor.

9 THE COURT: Well, I'm going to find that even if the
10 victim objects that I would have to enter a continuance based
11 upon the representations made that the case is not ready.

12 Do you have a date out there, Ms. Fox, 90 to 120 days?

13 THE COURTROOM DEPUTY: We could set trial for
14 February 22nd and then another pretrial conference on
15 February 3rd at 9:30.

16 THE COURT: Is that all right?

17 MS. RUBIN: That's fine with us, Your Honor.

18 MS. LISTER: Yes, Your Honor.

19 THE COURT: If the victim is someone that wants this
20 case resolved and objects to continuances, I need to know that.
21 And Ms. Rubin should know that because it would affect my
22 response to any other motion for a continuance. So -- I mean,
23 at this point, I would expect to try it on the 22nd of February,
24 absent some other showing. And, of course, if the victim has --
25 they have a right to be involved in this process -- has any

1 position on that trial date and any other continuances, I want
2 to know that.

3 MS. LISTER: Your Honor, as I said, Ms. Rubin just
4 told me this morning that she intended to ask for a continuance.
5 So we will immediately reach out for the victim. I'll file a
6 motion with -- or -- a response with the Court that the victim
7 either does or does not have an objection to the continuance.

8 THE COURT: All right.

9 MS. LISTER: Is that sufficient?

10 THE COURT: Yes. I just think -- I think I'm required
11 to do that. Something needs to be in the record, so --

12 MS. LISTER: You are. And I appreciate you
13 recognizing that, Your Honor.

14 THE COURT: All right.

15 MS. LISTER: Your Honor, just one other point; and
16 that is if this comes to the Court again about if the defendant
17 was to provide a different residence without any children, the
18 government would still object to release.

19 THE COURT: I know.

20 MS. LISTER: Well, and --

21 THE COURT: I didn't say what I would do. I just -- I
22 would have to have a hearing about that. So --

23 MS. LISTER: All I'm saying, Your Honor, is his method
24 of operation is not to molest a child in his house or his state.
25 He goes on line and misrepresents himself, and he did that as

1 late as January of 2008.

2 THE COURT: What I'm saying, Ms. Lister, is I'll hear
3 all that if it's brought back to me. But I'm going to forget
4 what you said now. I mean -- in other words, it's --

5 MS. LISTER: All right.

6 THE COURT: I've denied it. And this matter won't be
7 in my head unless you file another motion to hear it. And
8 normally, the way we do things is if there's going to be new
9 evidence, which I've said -- I'm denying this, so you'd file
10 another motion. It would be heard by the magistrate, and then I
11 would hear the appeal. I want to think about whether there's
12 any institutional reason why I should do one or the other. In
13 other words, we try to make it so that the magistrate hears
14 everything and we don't have double hearings -- you know --
15 where there's one hearing on one record and one on another.
16 Here, we haven't, except to the extent we heard the brief
17 testimony. So it may be better for me just to hear the whole
18 thing, but I'm going to think about that. So if you file
19 another motion, I'm then going to have to consider that. But --
20 all right.

21 Anything further?

22 MS. RUBIN: Just so you know, Mr. Shelly does waive
23 his right to a speedy trial. I know that the Court didn't have
24 an opportunity to discuss that with him, but I just want to let
25 you know we've discussed that.

1 THE COURT: Did you understand all this, Mr. Shelly?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: I should have discussed this with you, and
4 I was responding to other things. But you have a right to a
5 speedy trial. What that means is that ordinarily, we'd try you
6 within about 70 days of when you were arrested. And I'm sure
7 that the Spokane County Jail is a very uncomfortable place for
8 you to be, and so you have an interest in getting the case
9 resolved as fast as you can. But you also have an interest in
10 having your lawyer ready to try it. So the continuance then
11 means that you're not going to be tried within the time set by
12 the Speedy Trial Act because I have to exclude that time in
13 order to give your lawyer time to be prepared. Do you have any
14 objection to that?

15 THE DEFENDANT: No, Your Honor.

16 THE COURT: Well, I'm going to find that the public
17 and the defendant's interest in a speedy trial are outweighed by
18 the defendant's interest in being properly prepared for trial
19 and exclude the time from the current trial date to the new
20 trial date, finding the ends of justice require that.

21 Anything else, Ms. Fox?

22 THE COURTROOM DEPUTY: No, Your Honor.

23 THE COURT: Our pretrial date is what?

24 THE COURTROOM DEPUTY: Is now February 3rd.

25 THE COURT: If you're going to file any motions, file

1 them by the first week of January.

2 Is that enough time, Ms. Rubin?

3 MS. RUBIN: I believe so, Your Honor. I believe that
4 all of the discovery is actually available at the FBI. So I
5 don't think there's an issue of having to wait for any forensic
6 analysis.

7 THE COURT: Would you set the time there, Ms. Fox --
8 the date?

9 THE COURTROOM DEPUTY: File them by Friday,
10 January 8th.

11 THE COURT: All right. Okay. Court's in recess.

12 (The proceedings recessed at 10:40 a.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on page 1 hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 14th day of October, 2009.

/s/Debra Kinney Clark

Official Court Reporter
United States District Court
Eastern District of Washington